No. 74-215

FEB 19

MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN R. PARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE GROCERY MANUFACTURERS OF AMERICA, INC. AS AMICUS CURIAE

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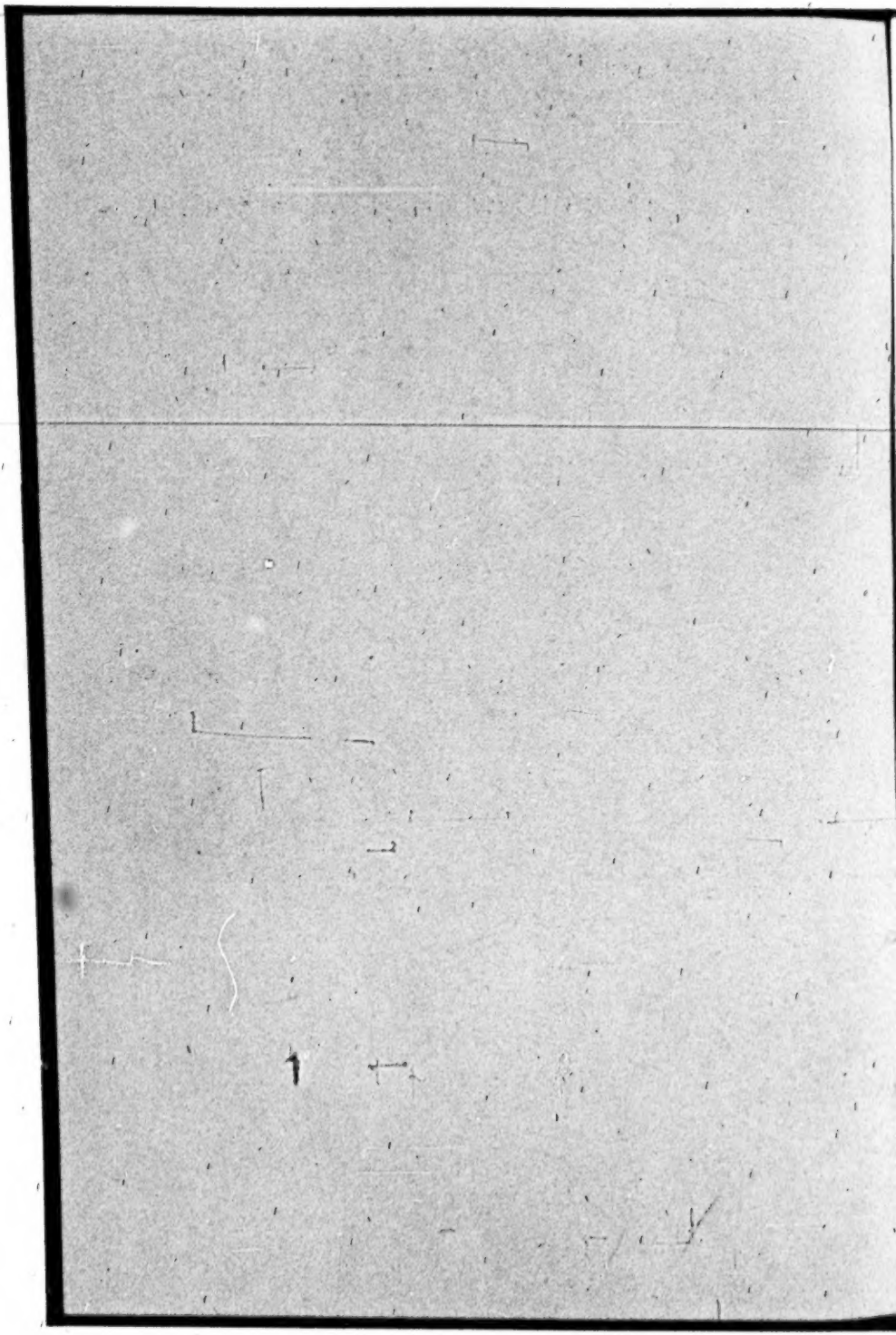

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INTEREST OF AMICUS CURIAE

The Grocery Manufacturers of America, Inc. (GMA) is a trade association of the leading manufacturers and processors of food and nonfood products sold in retail grocery outlets throughout the United States. GMA represents the interests of its member companies in administrative, judicial and legislative proceedings.

The food industry shares with the Food and Drug Administration (FDA) the goal of providing safe, wholesome,

nutritious and properly labeled foods. GMA and its members regard this industry as having a primary mission and responsibility for assuring the integrity of the food supplied to the nation's consumers.

To that end, GMA seeks to take a positive, constructive view of the roles and duties of its members in terms of compliance with the spirit as well as the letter of the law.[1]

The case at bar raises a vital issue regarding the definition and scope of potential criminal liability for corporate officers arising out of company violations of the Federal Food, Drug, and Cosmetic Act.

GMA's member companies have a direct, major interest in the resolution of this issue, since pertinent statutory provisions apply to all food processors. This Court's ultimate decision, therefore, will have a profound effect on all GMA members.

GMA and its members seek clear enunciation of fair, just and practical standards of criminal liability for affected individual corporate officers and employees under the Act as an incentive to effective compliance with the law.

In GMA's view, the court of appeals below provided strict but practical standards by requiring that individual criminal liability must rest on proof of the responsible individual's *own* "wrongful action," whether by deed or omission.

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[1] For example, GMA in March 1974 published "Guidelines for Product Recall," a comprehensive manual to assist companies in improving their procedures for undertaking voluntary product withdrawals for any reason. In 1974, GMA also joined FDA and six other food trade associations in publishing "Voluntary Industry Sanitation Guidelines for Food Distribution Centers and Warehouses," and sponsored regional public seminars on warehouse sanitation for industry members.

By contrast, the Justice Department exploits the facts at bar to assert a vague "test of constructive participation" (Pet. 12), which would expose corporate officers to criminal prosecution at the bureaucratic discretion of enforcement officials without published "guidelines," "criteria," or "standards."

Such an authorization for harsh and arbitrary criminal prosecutions under the Federal Food, Drug, and Cosmetic Act, based on corporate status rather than individual "wrongful action" and shifting the burden of proving innocence to the accused, is offensive to established principles of fairness and justice and can serve no legitimate regulatory objective.

ARGUMENT

I. In Accord With This Court's 5:4 Decision In *United States v. Dotterweich* And The Requirements Of Due Process, The Court Of Appeals Correctly Held That A Corporate Officer Must Be Guilty Of "Some Wrongful Action" Which Contributes To The Violation To Be Criminally Liable Under The Federal Food, Drug, And Cosmetic Act.

The Federal Food, Drug, and Cosmetic Act imposes criminal penalties as one method of enforcing compliance with its public health purposes. 21 U.S.C. § 333. But as this Court has previously held, the Act's criminal provisions cannot be applied in disregard of constitutional requirements of due process and fundamental principles of criminal law. *United States v. Cardiff*, 344 U.S. 174 (1952).

The need for such constitutional safeguards is all the more critical where the Act's criminal sanctions may be applied vicariously to a corporate officer based upon violations of the Act by corporate employees outside of his direct and immediate supervision.

Accordingly, even more fundamental than the constitutional requirement that the law provide notice as to

"what persons are included or what acts are prohibited" (*id.* at 176), due process bars criminal conviction of an individual corporate officer absent proof of some wrongful conduct personally attributable to the corporate officer. *United States v. Dotterweich*, 320 U.S. 277 (1943).

Consistent with these due process requirements as well as an unbroken line of decisions by this Court, the court of appeals held that under Section 301 of the Act, "a finding of guilt must be predicated upon *some wrongful action* by [the corporate officer]" (Pet. App. 5A-6A) (emphasis added). Further elaborating, the court specified:

> "That action may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of food." (*Id.* at 6A).

In seeking to overturn this strict standard of care, the Justice Department misreads the 5-to-4 *Dotterweich* decision as dispensing with *any* proof of "wrongful action" by the corporate officer, and shifts to the individual defendant the exculpatory burden of proving that he is personally "without power" to prevent or correct the violation (Br. 22).

As we shall show, however, the Justice Department's vindictive theory of *absolute* criminal liability for corporate officers, based on corporate status rather than personal action or omission, is defective because:

(1) *Dotterweich* held only that a corporate officer who stands in a "responsible relationship" to the violation is not immune from the Act's criminal sanctions.

(2) Neither *Dotterweich* nor the Act dispenses with the requirement of proof of "some wrongful action" by the individual criminal defendant.

A. *Dotterweich* Held Only that a Corporate Officer Who Stands in a "Responsible Relationship" to the Violation Is Not Immune from the Act's Criminal Sanctions.

Contrary to the Justice Department's effort to extend the Delphic *Dotterweich* 5:4 majority opinion to eliminate the element of "wrongful action," *Dotterweich* addressed and decided only the issue of criminal liability under the Act of corporate officers who act in behalf of their corporate employers.

The Court in *Dotterweich* reversed a court of appeals decision that a corporate officer is *not* criminally liable for his own acts in the course of his corporate duties where the corporation was acquitted. *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500 (2d Cir. 1942). Thus, by a narrow 5-to-4 decision, the Court ruled that the Act permits *both* the corporation *and* the individual who *acts* for the corporation to be found guilty of the misdemeanor charged under the Act.

As stated by Mr. Justice Frankfurter for the majority:

> "But the only way in which a corporation can *act* is through the *individuals who act on its behalf* . . . . And the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty, . . . a doctrine given general application in § 332 of the Penal Code (18 U.S.C. § 550) [now codified as 18 U.S.C. § 2]. If, then, Dotterweich is not subject to the Act, it must be solely on the ground that individuals are immune when the 'person' who violates § 301(a) is a corporation, *although from the point of view of action the individuals are the corporation.*" 320 U.S. at 281 (emphasis added).

Accordingly, the Court rejected immunity for individual corporate officers, citing the absence of an express grant of immunity in the statute:

> "To speak with technical accuracy, under § 301 *a corporation may commit an offense and all persons who aid and abet its commission* are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission — assuming the evidence warrants it — to the jury under appropriate guidance. *The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction* which the statute outlaws. . . ." 320 U.S. at 284 (emphasis added).

That this Court's *holding* in *Dotterweich* deals only with immunity for individuals was subsequently reaffirmed in *United States v. Wise*, 370 U.S. 405 (1962). In *Wise*, the Court ruled that a corporate officer is subject to criminal prosecution under the Sherman Act for knowing participation in violative acts in his representative capacity for the corporation:

> "This Court was faced with the *same problem in United States v. Dotterweich* . . . . The Court of Appeals reversed the conviction of a corporate officer on the ground that only a corporation was a 'person' within the Act. This Court reversed the Court of Appeals, rejecting substantially the same argument that is advanced by the appellee in this case. The reason for the rejection is equally applicable to the case at bar. *No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion;* else the fines established by the Sherman Act to deter crime become mere license fees for

> illegitimate corporate business operations. Following *Dotterweich*, we construe § 1 of the Sherman Act in its common-sense meaning to apply to all officers who have a *responsible share in the proscribed transaction.*" 370 U.S. at 409 (emphasis added).

In short, the Court's holding in *Dotterweich* was that individual corporate officers were not *per se* immune under the Act. But *Dotterweich* did *not* spell out the standard of care which such officers must satisfy or just what acts or omissions by such officers constitute criminal conduct.

B. Neither *Dotterweich* Nor the Act Dispenses with the Requirement of Proof of "Some Wrongful Action" by the Individual Criminal Defendant.

Although not explicating the standard of care under the Act, *Dotterweich*, citing *United States v. Balint*, 258 U.S. 250 (1922), also observed that "such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing." 320 U.S. at 281.

While the Justice Department seizes upon that dictum as virtually the sole support for its position of *absolute* criminal liability for corporate officers and employees under the Act, *Dotterweich* never addressed the element of "wrongful action."

Actually, this much is clear from *Dotterweich*'s reliance on *United States v. Balint, supra*, which decided that *scienter* was not required for proof of a crime under the Harrison Narcotics Act. The Court concluded that Congress intended that *scienter* not be an element of the crime, holding that a seller of narcotic drugs, who "sells the inhibited drug in ignorance of its character" may be subject to criminal penalties. 258 U.S. at 254.

Moreover, the *Dotterweich* majority itself would plainly impose criminal liability under the Act only on proof of some "wrongful action."

Thus, the majority emphasized that the present Act essentially reenacted the Food and Drugs Act of 1906 with respect to the liability of corporations and their employees, with "deletion of words — in the interest of brevity and good draftsmanship." 320 U.S. at 282. Section 12 of that earlier statute stated, in pertinent part:

> "When construing and enforcing the provisions of this Act, the *act, omission, or failure of any officer, agent, or other person* acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be *the act, omission, or failure of such corporation, company, society, or association as well as that of the person.*" (Emphasis added).[2]

This language — which in pertinent part was set forth in the majority opinion, 320 U.S. at 281-82 — envisions the requirement of "some wrongful action" by an individual corporate employee as a prerequisite to criminal liability.

At other points, the *Dotterweich* majority opinion further indicates its understanding that "some wrongful action" must be proven. Thus, the opinion emphasized that the corporation acts only "through the individuals who *act* on its behalf," that "from the point of view of *action* the individuals are the corporation," and that Congress did not

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[2] The minority argued that the failure specifically to make corporate officers liable for the actions of their corporate employers in the 1938 Act indicates that Congress did not intend to impose such liability, and that Section 12 of the 1906 Act was intended simply to make the corporation liable for the illegal acts of its officers. *See, e.g.*, 320 U.S. at 287-91.

intend to exonerate corporate employees "involved in *acts* of disobedience" of the statute. 320 U.S. at 281, 283 (emphasis added). *Cf. United States v. Wise, supra,* 370 U.S. at 409 (liability related to the "acts of the corporate officer"). Further, the Court stated:

> "The Act is concerned not with the proprietary relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation *such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor.*" 320 U.S. at 283 (emphasis added).

Similarly, the Court noted that the Act casts risks "upon all who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor." 320 U.S. at 284. Elaborating with respect to situations involving corporations, the majority opinion referred particularly to those who "*aid and abet*" the commission of the crime. *Id.* And the opinion carefully pointed to those "who do have such a responsible share in the furtherance of the transaction which the statute outlaws." *Id.*

Above all, these passages from *Dotterweich* demonstrate that this Court did *not* intend to make corporate officers and employees criminally liable merely because of their status or positions within the corporation, without any personal causative relation *to the wrongful transaction.* Rather, the *Dotterweich* decision supports the conclusion of the court below that:

> "It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider; 21 U.S.C. § 331 is concerned with criminal conduct and not proprietary relationships." (Pet. App. 5A).

Accordingly, the court of appeals correctly disposed of the Department's misapplication of *Dotterweich:*

> "The error here is that the Government has confused the element of 'awareness of wrongdoing' with the element of 'wrongful action'; *Dotterweich* dispenses with the need to prove the first of those elements but not the second." (Pet. App. 4A) (footnote omitted).

Nor does any other authority support the Department's spurious extension of *Dotterweich* to dispense with the essential element of "wrongful action."

The Department's key judicial precedents lend no support. In *Morissette v. United States*, 342 U.S. 246 (1952), this Court reversed a conviction for taking government property where the prosecution failed to prove the defendant's *criminal intent*. The court distinguished *Dotterweich* and *Balint* as cases in which "abandonment of the ingredient of *intent*" related to "the peculiar nature and quality of the offense." 342 U.S. at 259 (emphasis added). Those cases pertained to statutes that defined crimes that do not "require a *mental element*." *Id.* at 260 (emphasis added). *United States v. Freed*, 401 U.S. 601 (1971) (similar). And in *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964), this Court only noted that "[i]t is settled law in the area of food and drug regulation that a *guilty intent* is not always a prerequisite to the imposition of criminal sanctions." 376 U.S. at 91 (emphasis added) (dismissal of a *corporate* defendant reversed).

Likewise, the Department's legislative history (Br. 26-30) is limited to the question of "intent," not "wrongful action." The testimony of Charles Wesley Dunn, then GMA General Counsel, stated simply that "intent is not an essential ingredient of the offense" under the Act. *Hearings before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S.1190 and H.R. 4071*, 80th Cong., 2d Sess. 49 (1948). In light of the prevailing 1943 *Dotterweich* decision, a contrary view in 1948 would have been

surprising. But nothing in that statement, or other aspects of the legislative history, disavowed the minimal requirements of the prosecution's proof of the element of "wrongful action" as a prerequisite of individual criminal guilt.[3]

In sum, the issue of just what constitutes "wrongful action" by corporate officers was left open by *Dotterweich*, and was not dispensed with as an element of individual criminality under the Federal Food, Drug, and Cosmetic Act.

In this context, the court of appeals has properly interpreted the Act to require proof of "some wrongful action" as a prerequisite to criminal liability for corporate officers. As the court noted, the officer must have personally taken some "acts . . . which cause the adulteration of such food" (Pet. App. 4A). That "wrongful action," as further defined,

> "may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of the food." (Pet. App. 6A).

Indeed, the court of appeals properly cautioned:

> "As a general proposition, some act of commission or omission is an essential element of

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[3] Actually, strong concerns exist as to the concept of criminal liability without "awareness of wrongdoing." *See e.g.*, Hall, J., *General Principles of Criminal Law*, 304-309, 342-351 (2d ed. 1960); *Developments in the Law—The Federal Food, Drug, and Cosmetic Act*, 67 Harv. L. Rev. 632, 694-96 (1954). However, that issue need not now be resolved by this Court, since the court below did not dispute the *Dotterweich* disavowal of the need for culpable intent. (Pet. App. 4A). While that interpretation may offend constitutional requirements of due process, that issue is not necessarily before this Court except insofar as the Department confuses wrongful intent with "wrongful action."

> every crime. For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime." (Pet. App. 4A).

Actually, a lesser requirement for imposing personal criminality might will leave the Act constitutionally vulnerable. For in *Cardiff*, invalidating the Act's factory inspection provisions as constitutionally defective for imposing criminality "without fair and effective notice," this Court stressed that:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining *what persons are included* or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." 344 U.S. at 176 (emphasis added).

Cf. Powell v. Texas, 392 U.S. 514, 533 (1968) ("criminal penalties may be inflicted only if the accused has committed some act. . . .").

II. The Justice Department's Contentions Would Expose Corporate Officers To Arbitrary and Harsh Criminal Prosecutions, Unnecessary For Any Legitimate Regulatory Objective.

While disavowing vicarious liability, the Justice Department would nevertheless expose corporate officers to criminal prosecutions largely on the basis of their corporate *status* rather than any identifiable act or omission on their part.

To be sure, the Department's brief eschews the doctrine of vicarious liability, asserting that the Act's liability is "strict" but "not vicarious" (Br. 14). On the other hand, the Department also claims that "the test of constructive

participation is official responsibility, whether the corporation be large or small" (Pet. 12).

Actually, the Department's brief heavily postures criminal liability on the accused's corporate status. According to the Department, the Act

> "makes responsible corporate officials criminally liable for failure to discover and correct insanitary conditions because they have the power and responsibility to prevent such conditions, and have failed to do so." (Br. 20).

Significantly, a "responsible relation" to the offense must be attributed to "officials who have the power and responsibility to prevent or discover and correct violations and fail to do so" (Br. 17). And while elsewhere the Department proposes to confine this liability to "responsible" officials within "their zone of responsibility" (Br. 21), objective indicia of such "responsibility" are nowhere defined.

Essentially, the Department's circular formulation would delete the element of "wrongful action" from the criminal offense, and shift the burden of exculpation to the accused officer once his corporate status appears. For, per the Department, criminal "responsibility" may be avoided by "allowing an apparently responsible corporate official to prove — *as a matter of defense* — that he is without power to affect the prohibited condition" (Br. 22) (emphasis added). Again, criminal liability remains "for the jury to determine in the light of his functions within the corporations and such *defensive matters* as he may raise at trial bearing on his power with respect to the violation" (Br. 23) (emphasis added).[4]

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[4] Surprisingly, and inconsistently, the Department's brief interpolates that "the government must offer proof of *actual supervisory responsibility relating to the prohibited conditions*" (Br. 25). This

(continued)

Such a doctrine, however, vests almost total discretion in enforcement agencies to prosecute top corporate officers for any violation of the Act by their business firms. The Act proscribes a host of derelictions to which criminal liabilities may attach under the umbrella criminal bans of § 301. So long as an "apparently responsible corporate official" (Br. 22) was shown to have an undefined "responsible relation" to such violations, he could become liable to criminal prosecution, with the issue of guilt or innocence going to a jury.

But such untrammeled prosecutorial discretion is not authorized by statute or controlling precedent.

As previously detailed, neither the Act nor this Court's precedents authorize or sanction the absolute criminal liabilities asserted by the Department. While dispensing with the concept of "awareness of wrongdoing" as a component of criminality in a narrow category of regulatory enactments, no such deletion of the requisite "wrongful action" was heretofore contemplated or authorized for inflicting criminal penalties on *individual* corporate officers and personnel. *See* discussion of *Dotterweich, supra.*[5]

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[4] *(continued)*
departure from the Petition's "constructive participation" doctrine (Pet. 12) parallels the court of appeals' rationale requiring "some wrongful action," since failure to take affirmative action or to exercise direct supervisory responsibility might be deemed gross negligence, inattention to corporate duty, or omission when done by the corporate official who is in fact responsible for sanitation.

[5] Inasmuch as no *individual* defendant was there involved, the Department's reliance (Br. 14, 19, 22-23) on *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, is gravely misplaced. In any event, the Court there noted:

> "We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and reach of the statute as applied to such facts as may be developed by evidence advanced at trial." *Id.* at 91.

Nor are the enforcement agencies' "criteria," "standards," "policy," "guidelines," or "reasonable discretion" (Br. 30-32) an acceptable substitute. In the first place, the FDA's "internal review" and "enforcement guidelines" are neither published nor reviewable. And FDA's so-called "hearing" granted to "suspects" is an act of administrative grace, not legally required (320 U.S. at 279), and lacking the most elementary procedural safeguards such as a right of confrontation.

Such *in terrorem* powers of criminal prosecution, unqualified by any prerequisite of personal "wrongful action" by the accused individual, are not germane to any legitimate enforcement objective.

The American food industry comprises companies of all sizes. Many larger corporations with operations in many states employ thousands of employees in hundreds of establishments throughout the country. Their top officials have corporate responsibility and authority over all or many segments of their firms' operations. Their policies cannot be personally implemented, directed and controlled at every stage down to those employees whose direct actions may result in some violation of the Act. Such officers must and do rely on their creation of adequate procedures, and the delegation of authority to responsible subordinate officials.

It is within the realities of this need for appropriate delegation of authority that the responsibility of top corporate officials must be measured. As the court below rightfully noted:

> "To hold [a president] *criminally* liable for the wrongful actions of each and every one of these employees by merely showing his position with the corporation is manifestly unjust, unfair and beyond the realm of reasonableness." (Pet. App. 5A).

Indeed, the imposition of absolute liability would have a "questionable effect when applied to such groups as distributors or manufacturers operating under high standards who, as a practical matter, cannot take further precautions." *Developments in the Law — The Federal Food, Drug, and Cosmetic Act*, 67 Harv. L. Rev. 632, 695 (1954).[6]

Yet, under the Department's theory, the top official of a corporation employing thousands of persons could become criminally liable for the acts of individuals over whom, as a practical matter, he has no personal, direct control. He would be vulnerable to acts of sabotage, vengeance, insanity, and plain negligence and stupidity by people far removed from his personal supervision or actual control.[7] An inadvertent labeling error or an aberrant short-weight package could be the basis of criminal prosecution. A second minor infraction could bring a felony conviction for the corporate officer. § 303(b), 21 U.S.C. § 333(b).

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[6] Significantly, the General Accounting Office report cited by the Justice Department (Br. 36), which, on the basis of inspecting only 97 plants out of an estimated 60,000 food establishments (not including restaurants, retail stores and meat and poultry slaughtering and processing plants), concluded that sanitary conditions were deteriorating, recommended that Congress "consider amending the law to provide for *civil penalties* when food sanitation standards are violated." Comptroller General of the United States, *Dimensions of Insanitary Conditions in the Food Manufacturing Industry*. Report to the Congress, No. B-164031(2) at 4, 40, 42 (Apr. 18, 1972) (emphasis added). A similar civil remedy is suggested in the Harvard Law Review article. 67 Harv. L. Rev. at 696.

[7] Paradoxically, the Department's concept of absolute criminal liability could reach the Secretary of Health, Education and Welfare, the Commissioner of Food and Drugs and other top agency officials under this very same statute. Section 301(j) prohibits, on pain of criminal penalty, the unauthorized disclosure by any FDA employee of trade secret information acquired in the course of official duties. Since top agency officials exercise supervisory authority, they might be deemed to stand in the same posture as a corporate official under the Department's "constructive participation" test. (Pet. 12).

Nor would a requirement of some *personal* "wrongful action" encourage subterfuge by spurious delegations of real corporate authority. (Br. 37-38). The court of appeals' rationale could reach any instance of wrongful "omission," without exposing a corporate official to criminal prosecution by reason of his status rather than his personal deed or omission.

Most fundamentally, the Department's contentions offend established tenets of criminal justice.

First, the Department would obliterate the prerequisite of not only "awareness of wrongdoing" but also "some wrongful action" on the part of the accused individual. In practice, the Department would supplant individual "wrongful action" with corporate "status," a dangerous dimension of personal criminal liability. *Cf. United States v. Robinson*, 370 U.S. 660 (1962) (holding unconstitutional criminal statute punishing defendant's "status" as narcotics addict).

Second, the Department would effectively abrogate the presumption of innocence in criminal cases for corporate officials under the Federal Food, Drug, and Cosmetic Act, by shifting to them the burden of disproving personal guilt.[8] For under the Department's theory, "the test of constructive participation is official responsibility" (Pet. 12),

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[8] At one point, the Department asserts that the individual officer's only defense is to show that he was "without power" to prevent or correct the violation (Br. 22). This extreme and vindictive contention is the equivalent of stating that any corporation president, who according to his corporate employer's by-laws is responsible for the operation of the business, can become criminally liable under the Act for all violations by the corporation.

Significantly, "Peter Barton Hutt, assistant general counsel of the Food & Drug Div. of the Dept. of Health, Education & Welfare, makes it clear that the only exceptions he has in mind are the presidents 'who spend their entire lives down in Florida and let some other guy run the company.' " *Business Week*, February 24, 1975, p. 102.

with guilt or innocence "for the jury to determine in the light of his functions within the corporation and such *defensive matters* as he may raise at trial bearing on his power with respect to the violation" (Br. 23) (emphasis added). But any presumptions or culpability arising from corporate officer status, even if present in the statute, which they are not, would pose substantial constitutional questions. *Cf. Tot v. United States*, 319 U.S. 463 (1943) (a statutory presumption is unconstitutional where there exists no rational connection between the facts proved and the fact inferred).

Finally, the Department would relate individual criminality to unpublished and unreviewable administrative "criteria," "guidelines," or enforcement "policy" (Br. 31-32), which are always subject to change without notice. But bureaucratic discretion and internal routines cannot satisfy this Court's admonition, in *Cardiff*, that "fair warning" is required as to "what persons are included or what acts are prohibited." 344 U.S. at 176.

Above all, per the opinion of the court of appeals, the prosecution, as always required under criminal law, must prove beyond a reasonable doubt that the accused individual has taken "some wrongful action" which has caused the violation. In the case of a corporate officer, the prosecution must also go forward and prove, beyond a reasonable doubt, that the officer was in fact in a responsible position with respect to the violation, *and* that he in fact acted or failed to act properly in light of his position in a manner which contributed to the violation of the Act.

As the court below correctly stated:

> "[T]he requirements of due process are intended to favor fairness and justice over ease of enforcement. We perceive nothing harsh about requiring proof of personal wrongdoing before

sanctioning the imposition of criminal penalties." (Pet. App. 6A).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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